

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the matter of the Application of) Application NO. M-14105
Nebraskaland Leasing & Associates, dba)
Nebraskaland Moving & Storage, Lincoln,)
Nebraska, seeking authority as a common) DENIED
carrier in Nebraska intrastate commerce)
in the transportation of household goods)
and office equipment between points in)
Nebraska over irregular routes.) ENTERED: September 17, 1996

APPEARANCES: For the Applicant:
John Boehm
811 S. 13th Street
Lincoln, NE

For all Protestants,
with the exception of
Star Warehousing Company:
Earl H. Scudder, Jr.
Heidi Hornung Scherr
P.O. Box 81277
Lincoln, NE 68501

BY THE COMMISSION:

OPINION AND FINDINGS

By application filed March 28, 1996, Nebraskaland Moving and Storage (Nebraskaland or Applicant) seeks authority to operate as a common carrier of household goods and office equipment in Nebraska intrastate commerce. Notice of this application was published March 29, 1996, pursuant to the rules of the Commission. Protests to this application were filed by A-1 Metro Movers, Omaha; Andrews Van Lines; Benson Transfer & Storage Co.; Borley Moving and Storage, Inc.; Buck's Moving and Storage; Chieftain Van Lines, Inc.; Ford Van Lines, Inc.; and Star Warehousing Company (Protestants). Hearing on the application was held June 28, 1996, in the Commission Hearing Room, Lincoln, Nebraska with appearances as shown.

Applicant produced four witnesses in support of its application.

Randy Hartshorn testified: He, and his brother, J.R. Hartshorn, own Nebraskaland. Nebraskaland presently operates interstate as a carrier of household goods. Nebraskaland's interstate operations are performed as an affiliate of Paul Arpin Van Lines. Nebraskaland

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performs no Nebraska intrastate service under approved operating authority, although its equipment and drivers participate in such moves under a purported lease of authority from Husker Express in Seward (Husker). An equipment lease between Nebraskaland and Husker is on file with the Commission, but the operation is conducted as a lease of authority. (T. 37). Approximately 15% of Nebraskaland's business comes through such intrastate shipments made under the authority leased from Husker for which no record of Commission approval is evident. Most of this business is received through direct calls made to Nebraskaland as a result of its Yellow Pages advertising. Husker conducts no household goods movements except via lease of its authority.

Terrie Hartshorn testified: She is the mother of Randy Hartshorn. She and her husband own Hartshorn's Moving (Hartshorn's), a company that shares a building and employees with Nebraskaland. Ms. Hartshorn applies the tariff rates to the moves that are made by Nebraskaland.

Mel Mullennax of Nebraska Furniture Mart testified: He uses Nebraskaland to perform local moves for repossessions because of its low rates, and the rates currently being charged by other intrastate carriers are not cost effective. He would not use Applicant in the future in the event that Nebraskaland published a tariff that requires it to charge the same rate as those other carriers.

Todd Hartshorn testified: He answers phones for Nebraskaland. A few days prior to the hearing, he called each of the Protestants with hypothetical shipments for the fourth, fifth, sixth, or seventh of July. These mythical shipments were from Lincoln, Grand Island, Omaha, Waverly, and Central City to either Imperial or Chadron. Most of the Protestants were not able to transport the shipments until the eighth. One Protestant, Ford Van Lines, stated that the shipment could be handled on the fifth and sixth but an extra charge would have to be made because it involved a week-end day.

Each Protestant produced one witness: William A. Cronstrom, A-1 Metro Movers; Clayton Andrews, Andrews Van Lines, Inc.; Steven J. Westerfield, Benson Transfer and Storage Co.; Dennis Bauder, Borley Moving and Storage, Inc.; Norm Buck, Buck's Moving and Storage; Dennis Leslie, Chieftain Van Lines, Inc.; Harlan Wiederspan, Ford Van Lines, Inc.; and John Andrews, Star Warehousing Company.

Each Protestant witness testified that the number of available intrastate household goods movements is limited and extensive efforts are necessary to obtain a share of the business in a highly competitive environment. Dennis Leslie of Chieftain Van Lines, Inc. (Chieftain) testified that, despite advertisements in the Yellow Pages and direct mailings, Chieftain had not performed a single intrastate shipment in 1995 or 1996.

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All of the witnesses for the Protestants testified to the number of trucks and tractor/trailers they had registered for intrastate shipments with the Commission. Clayton Andrews of Andrews Van Lines, Inc. (Andrews), and Dennis Leslie of Chieftain testified that they had 70 and 60 additional pieces of equipment, respectively, that could be licensed for intrastate movements if the demand arose.

PRELIMINARY RULINGS

1. Validity of Protests

Applicant objected to the validity of all of the protests with the exception of Andrews as not having complied with Rule of Commission Procedure 005.07 for failing to specifically state their interest in the matter. The Commission finds that the protests meet the requirements of Rule 005.007.

2. Admissibility of opinions of employees of Andrews upon which Clayton Andrews based business decisions.

The Commission finds that statements made by employees of Andrews upon which Mr. Andrews based his decisions are admissible, and they are not hearsay under NEB. REV. STAT. §27-801 (Reissue 1990) as counsel for Nebraskaland contends.

3. Relevance of Andrews' relationship with Hartshorn's

The Commission finds that Andrews' past relationship with Hartshorn's is relevant pursuant to NEB. REV. STAT. §27-401 (Reissue 1990) which defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

The Applicant argues that this evidence is not probative because Hartshorn's is a separate entity from the Applicant. However; the evidence presented at the hearing shows the line separating Hartshorn's from the Applicant to be very indistinct, making it difficult to determine where one company stops and the other starts. First, the companies are located under the same roof. Second, Terrie Hartshorn, owner of Hartshorn's, performs clerical duties and calculates tariffs for both Hartshorn's and the Applicant. Third, Todd Hartshorn answers phones for both companies. Finally, Randy Hartshorn, owner of Nebraskaland and an employee of Hartshorn's, committed the violations, went to Andrews, and provided the documents necessary to correct Hartshorn's records when the dispute arose with Andrews.

DISCUSSION

Certificates of public convenience and necessity will be issued if (1) the applicant is fit, willing, and able to properly perform the services proposed in conformance with the applicable statutes and the underlying rules and regulations; and (2) the proposed services are required by the public convenience and necessity. NEB. REV. STAT. §75-311 (Supp. 1995). Applicant has the burden of showing all requirements of §75-311 have been satisfied to be granted an intrastate household goods certificate. In re Application of Greyhound Lines, Inc., 209 Neb. 430, 433, 308 N.W.2d 336, 339 (1981).

Fit, Willing, and Able

Although the cross-examination demonstrated that Applicant has not fully complied with Commission rules regarding the leasing arrangement with Husker and application of tariffs required by the Commission, Applicant's behavior has not been egregious enough to warrant a finding by the Commission that Applicant is not fit, willing, and able to properly perform the proposed services in conformance with the applicable laws. Applicant is advised to revise its leasing arrangement with Husker in compliance with Commission rules and comply to the tariffs required by the Commission.

Public Convenience and Necessity

Applicant's application should be denied because it has not proven its services to be required by public convenience and necessity. In determining public convenience and necessity, the deciding factors established by the Supreme Court are (1) whether the operation will serve a useful purpose responsive to the public demand or need, (2) whether this purpose can or will be served by existing carriers, and (3) whether it can be served by the applicant in a manner without endangering or impairing the operations of existing carriers. Kilthau v. Molasses Haulers, Inc., 236 Neb. 811, 816, 464 N.W.2d 162, 166 (1991).

1. Responsive to the Public Demand or Need

"... [T]he existence of an adequate and satisfactory service by motor carriers already in the area is complete negation of a public need and demand for added service by another carrier." In re Application of Renzenberger, Inc. v. Brown's Crew Car of Wyoming, Inc., 225 Neb. 30, 36, 402 N.W.2d 294, 299 (1987), *citing*, In re Application of Canada, 154 Neb. 256, 261, 47 N.W.2d 507, 510 (1951); Schmunk v. West Nebraska Express, 159 Neb. 134, 65 N.W.2d 386 (1954). The Applicant did not present any evidence showing a public demand or need for the services of the Applicant. Applicant relies on the testimony of Mel Mullennax from Nebraska Furniture Mart for evidence of public demand. Although Mr. Mullennax has used Applicant in the past for local shipments, he has never used it for intrastate movements. (T. 51). When questioned on cross-examination about whether Nebraska Furniture Mart would use Nebraskaland's services for intrastate moves if it was granted intrastate authority and

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Nebraskaland was subject to tariffs requiring set rates, Mr. Mullennax testified that he would be unable to do so. (T. 58).

Applicant attempts to rely upon the past operations of Husker as supporting public need. Evidence of prior operations for the purpose of showing need is relevant only where the prior operation has been conducted under color of authority, as in grandfather or interim applications. See Preisendorf Transportation v. Herman Bros., 169 Neb. 693, 706-707, 100 N.W.2d 865, 874 (1960). In Preisendorf, the applicant had operated for ten years under an invalid certificate of authority. When its authority was challenged the court accepted evidence of its past operations because it had been operating under the "color of authority." Evidence of Nebraskaland's prior operations does not establish demand, as the prior operations were not being conducted under color of authority. The Applicant has been leasing another carrier's authority, without approval of the Commission, instead of leasing its equipment to that carrier as required by Commission Rule 008.02A5. These operations have no probative value on the issue of public demand or need because they are either tacitly illegal or reflect the operations of another carrier whose authority will continue to be available to the public.

2. Served by Existing Carriers

With regard to the second part of the test, the evidence introduced by the Protestants shows a more than adequate availability of household goods carriers already responding to public demand. The Protestants testified that they have not experienced any demand for household goods carriers that is not currently being met. (T. 102-103; 149-150; 160; 175; 186; and 194). The competition for a relatively few intrastate shipments is fierce. Dennis Leslie of Chieftain testified that he did not transport a single intrastate movement during 1995 or the first quarter of 1996, despite being ready and able to handle intrastate shipments. (T. 193). Mr. Leslie testified that he had eight straight trucks registered with the Commission, and over sixty pieces of other equipment licensed exclusively for interstate use that could be licensed intrastate if the demand arose. (T. 196). Other Protestants also testified to having other equipment that could be licensed in the event of a rise in the demand for intrastate household goods movements. This evidence demonstrates that both current and future demand can be met by existing carriers.

3. Endangering or Impairing the Operations of Existing Carriers

Each of the Protestants testified that the addition of another household goods carrier would damage its existing intrastate operations. (T. 101-106; 120-122; 148-149; 159-160; 174-175; 185-186; and 194). Of the seven Protestants, only two reported revenues from intrastate shipments that were over 10% of their total revenues. (T. 101 and 184). Adding another carrier would dilute these percentages even more and would likely place in jeopardy the intrastate operations of the existing carriers, who have abided by the Commission's rules and regulations. The Supreme Court has stated "[t]he primary purpose of Commission control is to secure adequate sustained service for the public at a minimum cost and to protect and conserve investments already made for such purpose. . . ." Basin Truck Co. v. R.B. Dick Wilson, Inc., 166 Neb. 665, 670, 90 N.W.2d 268, 271 (1958).

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The Legislature continues to support the regulation of household goods carriers. The Legislature has stated that it is its policy "to regulate transportation by motor carriers . . . of household goods in intrastate commerce upon the public highways of Nebraska in such manner as to recognize and preserve the inherent advantages of and foster sound economic conditions in such transportation and among such carriers, in the public interest." NEB. REV. STAT. §75-301(2) (Supp. 1995).

It is the obligation of the Commission to implement and enforce the policies of the Legislature. Applicant has failed to meet its burden of proving public convenience and necessity.

Findings

From consideration of all of the evidence presented at the hearing regarding Application No. M-14105, and being fully informed in the premises, the Commission is of the opinion and finds:

1. The proposed services are not required by public convenience and necessity because Applicant's proposed operation will not serve a useful purpose responsive to public demand or need, public demand or need is currently being met by existing carriers and future demand or need will be met by existing carriers, and public demand or need cannot be served by Applicant in a manner without endangering or impairing the operations of existing carriers.
2. The application should be denied.


ORDER

IT IS, THEREFORE, ORDERED by the Nebraska Public Service Commission that the Application No. M-14105 of Nebraskaland Leasing & Associates, dba Nebraskaland Moving and Storage, Lincoln, Nebraska be, and it is hereby, DENIED.

MADE AND ENTERED AT Lincoln, Nebraska this 17th day of September, 1996.

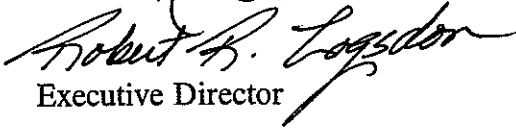
NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:


//s//Rod Johnson
//s//Frank E. Landis
//s//James F. Munnelly
//s//Daniel G. Urwiller

ATTEST:

Chairman 


Executive Director